THE DEFENCE OF ACT OF STATE IN RESPECT OF ACTS COMMITTED ON BRITISH TERRITORY.

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After analysing the concept of " Act of State " in English law in 1934 *Year Book of International Law*,[2] E. C. S. Wade arrives at this definition or description : " Act of state means an act of the Executive as a matter of policy performed in its relations with another State including its relations with the subjects of that State unless they are temporarily within the allegiance of the Crown."

Arising out of this, there are two aspects of the nature of act of state in general which should be emphasized before one considers the specific problems of the extent to which it can constitute a defence to an otherwise good cause of action.

First, it can be noted that an act of state is concerned with the sphere of international and not municipal relations. It is an act of policy by the Executive of a State in relation to another State or the citizens or representatives of another State. It cannot extend to acts of the Executive in relation to citizens of its own State. The historical basis of this limitation lies in the triumph of the Long Parliament over the complete arbitrary power of the Crown which guaranteed that henceforth, so far as British municipal law was concerned, the conduct of government could not become the subject of a special system of law. True, the Courts did not discard the maxim that " The King can do no wrong " which has remained substantially inherent in our law until the comparatively recent legislative modifications, but this irresponsibility of the Crown was offset by the principle developed by the common law of the responsibility of Ministers. It was made increasingly clear that a Minister was to remain personally responsible for his acts and could not be shielded by the Crown.

In his famous judgment in *Entick* v. *Carrington*[3] in 1765 Lord Camden roundly condemned the doctrine of State necessity under which it was claimed that the government was entitled to exceptional treatment at the hands of the Courts. " With respect," he said " to the argument of State necessity or a distinction which has been aimed at between State offences and others, the common law does not understand that kind of reasoning nor do our books take notice of any such distinction." This case appears to dispose of the claim of the Executive, already curtailed in many directions, to justify arbitrary interference with personal liberty or private property by means of the plea of public interest or act of state.

Parliament nowadays is perfectly willing in all proper cases to accede to the demand of the Government for additional powers but the point to be made is that " act of state " provides no legal coverage for wrongs sustained by a *subject* from arbitrary executive action. The international aspect of act of state is essential.

1. The Editors desire to thank both Professor A. G. Davis of Auckland University College, through whom this article was submitted, and the author himself (one of Professor Davis's students) for this contribution to *Res Judicatae*. They trust there will be more to follow from our sister Dominion.
2. at p. 34.
3. 19 State Trials 1030.

The other aspect is that where a matter falls within the proper category of an act of state then it is not justiciable by the municipal Courts. It may prove to be a matter for diplomatic redress or international arbitration but not for judicial enquiry. True, the Court may enquire as to whether an act is or is not an act of state but when once satisfied that an act of state does exist, then in the words of Fletcher-Moulton L.J. in *Salaman v. Secretary of State for India*,[4] it " cannot be challenged controlled or interfered with by the municipal Courts. Its sanction is not that of law, but that of sovereign power, and, whatever it be, the municipal Courts must accept it, as it is, without question."

From this settled rule that an act of state is not justiciable by the municipal Courts it follows that if an individual participates in an action which amounts to an act of state the doing of which inflicts an injury on the national of another State, the person joining in the act cannot be effectively sued in the Courts of his own country. Although he has caused harm he has done so in furtherance of an act of state in respect of which the injured party cannot claim from the Courts of that State his normal rights.

If then an act causing injury amounts to an act of state either by prior executive direction or by subsequent executive ratification, the subject of the foreign State thus injured will have no legal redress. He will have to seek it through other channels. As Wade and Phillips point out, act of state in such a case " is in the nature of a special defence qualifying the rule of municipal law which normally prevents a wrong-doer setting up that his tortious act was done by the command of the Crown."[5]

Now this defence has undoubtedly prevailed against a subject of a foreign State in respect of an act of state committed on foreign territory as evidenced in the decision of *Buron* v. *Denman*[6] but the question for investigation here is the extent to which it can apply to acts committed on *British territory*.

It has been stated already that an act of state cannot clothe the executive or a public officer with immunity for wrongs committed against a British subject. That was further illustrated in *Walker v. Baird*[7] where the submissions of the Attorney-General that the acts of a British naval captain in interfering with the private rights of the appellants who were British subjects carrying out those rights on British territory, were in pursuance of orders lawfully given by the Crown in the enforcement of a treaty entered into by the Crown with another power; that the Crown could by its prerogative bind its subjects by treaty; that it was an offence by the common law to disobey the provisions of a public treaty of this kind, and that the act of the Executive in enforcing that obedience did not give a cause of action, were all swept aside by the Judicial Committee.

But the House of Lords in *Johnstone v. Pedlar*[8] went much further than refusing this defence only against persons who were British subjects.

4. [1906] 1 K.B. 613, at p. 639.
5. *Constitutional Law* (3rd ed.), p. 177.
6. (1848) 2 Exch. 167.
7. [1892] A.C. 491.
8. [1921] 2 A.C. 262.

The cases in which the defence of act of state had hitherto been recognised had been cases in which the acts complained of were committed *out of British territory*. The plaintiffs had been foreigners and no question arose as to their being in any sense subjects of the Crown. But the different circumstances of this case gave rise to wider considerations. The facts are briefly as follows :—

The plaintiff was born in Ireland but had become a naturalised American citizen. He returned to Ireland in 1916, took part in the Easter rebellion of that year and was interned. On his release he took part in illegal drilling and, on being arrested in Ireland, a sum of money was found upon him which was taken and detained by the police authorities, the seizure and detention being subsequently ratified by the Chief Secretary for Ireland.

In an action by the plaintiff against the Chief Commissioner of Police for the recovery of the money, the defendant pleaded that the plaintiff was an alien and that the money was detained by the Crown as an act of state. The action was tried before Pim J. with a jury and the learned judge directed the jury to find for the defendant. The Divisional Court dismissed a motion by the plaintiff that the verdict or judgment should be set aside. He then appealed to the Court of Appeal where the opinion was divided, but in accordance with the decision of the majority the appeal was allowed. The House of Lords was then asked to restore the judgment of Pim J.

The Lords spent some pains in considering the status of an alien friend at English law, tracing the historical development of his rights and duties in comparison with the ordinary rights and duties of a British subject. They all arrived at the same conclusion : that an alien friend residing within the realm with the express or implied consent of the sovereign, shares the same immunity which a British subject enjoys from arbitrary executive action which is claimed to be an act of state.

Thus Viscount Finlay says : " The proposition put forward on behalf of the appellant was that residence in this country does not put an alien in the same position as a British subject in respect of acts of state of the government, and does not entitle him to bring an action against a tortfeasor whose act has been ordered or adopted by the government.

" I am quite unable to accept this proposition as a correct statement of our law. On such a view of the law aliens in this country instead of having the protection of British law would be at the mercy of any department entitled to use the name of the Crown for an ' Act of State.' It would have effect upon aliens in this country of a far-reaching nature as to person and property. If an alien be wrongfully arrested, even by order of the Crown, it cannot be doubted that a writ of *habeas corpus* is open to him and it would be surprising if he has not the right to recover damages from the person who has wrongfully imprisoned him. He has corresponding rights as regards his property. I am unable to find any ground either of principle or of authority for a proposition so sweeping, which would profoundly modify the position in this country of many aliens whose conduct, while resident here, has been without reproach."[9]

9. *ibid.* at p. 273.

Viscount Cave states in this regard: " No doubt a friendly alien is not for all purposes in the position of a British subject. For instance he may be prevented from landing on British soil without reason given . . . and having landed he may be deported, at least if a statute authorised his expulsion. . . . But so long as he remains in this country with the permission of the Sovereign express or implied he is a subject by local allegiance with a subject's rights and obligations."[10]

Again Lord Phillimore says: " From these propositions it would seem to follow that an alien *ami* complaining of a tort is in the position of an ordinary subject and that no more against him than against any other subject can it be pleaded that the wrong complained of was, if a wrong, done by command of the King or was a so-called act of State.

" From the moment of his entry into the country, the alien owes allegiance to the King until he departs from it and allegiance, subject to a possible qualification which I shall mention, draws with it protection, just as protection draws allegiance."[11]

These *dicta* then, appear to be clear authority for the proposition that an alien friend, resident in British territory with the express or implied license of the Crown and conducting himself so as to constitute an express or implied allegiance to the Crown is free from the defence of act of state, in an action in respect of a wrong sustained by him. But the facts surrounding Mr. Pedlar did not fit him happily into this category. He was a citizen of a friendly foreign country, it is true, but while resident in British territory he was anything but a well behaved, orderly, " friendly " alien, having participated in the Easter Rebellion of 1916 and in illegal drilling.

And so the question was considered by the learned Lords, whether by his hostile conduct alone, an alien *ami* could deprive himself of the allegiance to and hence, the protection of the Crown and thus place himself in the same position as a foreign subject on foreign territory in regard to an act of state. The words " by his conduct alone " are stressed because in this case no specific act was done by the Crown to withdraw his implied license to dwell within British territory and the rights accruing thereby.

Much was made of this in the arguments of counsel for the respondent. They maintained that the contention that the respondent was an alien enemy was not open to the appellant because it had not been pleaded and the Crown had taken no steps, as it could have done, to revoke its implied permission to the respondent to reside in British territory. If the high doctrine contended for by the appellant were to prevail the proper course was to have moved to take the writ off the file. Instead the Crown Solicitor had agreed to accept service on behalf of the Chief Commissioner of Police and the ratification, which was not issued until months after the action had been brought, was not pleaded.

On this question Viscount Finlay made these observations: " *Primâ facie* the subject of a State at peace with His Majesty is, while resident in this country entitled to the protection accorded to British subjects, but if it be proved in the Court before which the question arises that the

10. *ibid.* at p. 276.
11. *ibid.* at p. 297.

alien is by overt acts shewing that he is in active hostility to the government, though he does not thereby lose the protection of the law for his person and property as against private individuals, can he further claim all the privileges of a British subject as against the Crown and its servants ?

" These questions may arise in some other case. They cannot be decided in the present. . . . There is no allegation in the defence that the plaintiff was concerned in treasonable acts while in Ireland. Paragraph 4 of the defence is confined to the assertion that he is an alien, and is bad in law. . . . But the defence of act of State cannot be made good as the acts in the King's Dominions on a bare averment that the plaintiff is an alien."[12]

Thus Viscount Finlay raised the issue and then, it is submitted, avoided it on the pleadings of the case before him. Viscount Cave likewise thought it better not to express an opinion on this point as the question was not raised in the defence.

Lord Atkinson ventured his opinion in the following words: " It is true that he abused the rights which the protection of the King secured for him. . . . It is true that he might have been expelled from the country. But none of these things have been done. The protection to a resident alien is given by the Crown. The Crown alone can withdraw it. The appellant is still the subject of a State at amity with Great Britain. He does not come within the definition of an alien enemy, and the Crown has given no indication whatever that it has withdrawn his implied licence to reside within this realm. The fact that he has shewn himself unworthy of the Sovereign's protection, has abused his privileges and violated his allegiance, cannot, in my view *ipso facto* terminate the protection with all the rights which flowed from it which the Sovereign extended to him, or *ipso facto* withdraw the implied licence which the Sovereign gave to him to reside in this country."[13]

Lord Sumner expresses a similar view to that of Lord Atkinson just quoted.

Now Lord Phillimore's statements are, it is submitted, of some importance to the wider issues of this case for he is one judge who did not strictly limit himself to the facts before him. From his judgment it can be reasonably inferred that an alien resident in England, might under certain circumstances have no remedy against a plea of act of state.

He says: " From the moment of his entry into the country the alien owes allegiance to the King till he departs from it, and allegiance, subject to a possible qualification which I shall mention, draws with it protection, just as protection draws allegiance.

" Then is there anything special in this case ? The respondent has indeed no merits. On his own admission, he might have been tried, convicted and executed for high treason. His conduct shews evidence of much hostile feeling . . . But at the time when his money was taken from him, he was residing in the country, like any other alien, with the tacit permission of the King. He owed temporary allegiance to the King and for that reason could have been tried for high treason; but he was entitled till his trial to ordinary protection.

12. *ibid.* at pp. 274-5, *per* Viscount Finlay.
13. *ibid.* at pp. 284-5.

" The case of an alien who would be refused admission to this country if his entrance had been known and who lands surreptitiously and continues to be in the country surreptitiously might give rise to other considerations. This is not such a case.

" Also, I can conceive a case where an alien, though a citizen of a friendly State might land on our shores with private hostile intent, and continue in our country with that same intent so that his whole stay was one transaction, and a continuous act of high treason. To such an alien, suing for a tort or possibly some particular class of tort or possibly suing a public officer, it might be pleaded that he was disentitled to sue, or that the act was specially warranted, inasmuch as he had not the ordinary right to protection accorded by the King to an alien *ami*. I should not, however, like to do more than reserve my opinion till I had before me the precise language of the plea."[14]

Now it is submitted that the law arising out of this case regarding the defence of act of state in respect of acts committed on British territory might be stated in the following propositions :—

1. In the first case, as established in the earlier cases and confirmed here, act of state will never prevail against a British subject.

2. It will not prevail against a friendly alien resident in British territory notwithstanding that his conduct while in British territory has been prejudicial to public interest and the safety of the realm unless the Crown has by a deliberate act withdrawn the implied license to enter and remain from which he draws the legal protection enjoyed by British subjects.

The following three propositions, it is submitted, are also deducible from the decision and *dicta* of *Johnstone v. Pedlar*.[15]

3. It would follow from the decision that where an alien friend remains in the realm after the protection and license of the Crown has been specifically withdrawn the defence of act of state would prevail in respect of such acts suffered by him *subsequent to such withdrawal*. Mere subsequent ratification by the Executive of a wrongful act, however, does not deprive an alien of his legal protection.

4. The whole stress of *Johnstone v. Pedlar*[16] was laid upon the position of an *alien friend*, that is, the subject of a State at peace with the Sovereign, and it would appear that this protection is not in any way deemed to extend to an alien enemy present on British territory.

5. Lord Phillimore at least suggests in the *dictum* referred to earlier that in the case of *firstly* an alien who, having landed surreptitiously, would have been refused admission if his attempt to enter had been known and continues to remain surreptitiously within the realm, and *secondly* a citizen of a friendly State who landed on British shores with hostile intent, which intent remained throughout his stay, different considerations would apply from those in the facts before him, and thus such persons would not enjoy the full legal protection of British subjects in regard to acts of the Executive.

14. *ibid.* at pp. 297-8.
15. [1921] 2 A.C. 262.
16. *ibid.*

However, in the case of *Commercial and Estates Co. of Egypt v. Board of Trade*,[17] we have the *obiter dicta* of two eminent judges to the contrary so far as these last three propositions are concerned. The facts of this case are not really relevant to this discussion, but they concerned a claim for compensation against the Board of Trade in respect of a cargo of timber owned by neutrals and loaded on a British ship lying in a neutral port at the outbreak of World War I. The cargo was requisitioned by the British Government and brought to England without the consent, and in spite of the protests of its owners. The actual decision hinged largely on the effect of English legislation, but in the course of their judgments both Scrutton and Atkin L.JJ. thought fit to comment on the decision in *Johnstone v. Pedlar*,[18] to the effect that an act of state was inapplicable as a defence unless the act was committed outside the realm.

Scrutton L.J. states: "I should add that the claimants did not rely on any dealings with the cargo outside the realm for the probable reason that on the authority of such cases as *Buron v. Denman*[19] a claim by a foreigner for such acts would be successfully met by the defence that the interference was an act of State. Counsel for the Crown argued that a seizure within the realm of the property of a foreign person who was not within the realm by consent of the Sovereign was also an act of State. It is unnecessary to decide this in the view I have taken of the case, but it will take a great deal of argument to persuade me that, apart from action justified by statute, the defence that an act is an act of State is open to the Sovereign or the Executive within the realm. The language used in *Johnstone v. Pedlar*[20] appears to be inconsistent with such a view."[21]

And Atkin L.J. said: "I wish to deal shortly with one or two contentions raised by the Crown. One was that the action of the Timber Controller was an act of State, the loss caused by which gave no right to the claimants and could be determined by no tribunal. I have already negatived this view, but I confess myself at present unable to appreciate how such a defence arises in respect of an act done within the realm. The point seems to be disposed of by the decision in *Johnstone v. Pedlar*.[22]"[23]

It may be submitted that *Johnstone v. Pedlar*[24] does not justify the sweeping statements made *obiter* and which seem to deny that act of state can under any circumstances prevail in respect of acts done within British territory.

In the first place, the facts of the *Commercial Estates Case* did not place the alien claimants into any of the categories set forth in the last three propositions above which it is claimed are deducible from the House of Lords decision and are not "inconsistent" with it. The minds of Scrutton and Atkin L.JJ. may not have been directed to such circumstances but their *dicta* seems sweeping enough to exclude their possibility.

17. [1925] 1 K.B. 271.
18. [1921] 2 A.C. 262.
19. (1848) 2 Exch. 167.
20. [1921] 2 A.C. 262.
21. [1925] 1 K.B. 271, at p. 290.
22. [1921] 2 A.C. 262.
23. [1925] 1 K.B. 271, at p. 297
24. [1921] 2 A.C. 262.

It is in point to mention the case of *Netz v. Ede*[25] where a German subject who came to England from Germany in 1931 and started a business there, had applied for naturalization shortly before the outbreak of war. The application had remained in abeyance. In June, 1940, he was interned and still remained in an internment camp. In October, 1945 a notice was posted up in the camp under the authority of the Home Secretary giving a list of persons whom it was proposed to deport, including this German's name. Wynn-Parry J. held that the plaintiff who claimed to be a German national became an alien enemy and had no difficulty in holding that deportation of an alien enemy was an act of state for which no action would lie. Thus he says: " . . . the plaintiff is complaining that the defendant, acting in his official capacity, intends to cause the deportation of the plaintiff, and the plaintiff challenges the right of the defendant, acting in his official capacity, to do so . . . what is the nature of the act complained of? Is it an act of State? An act of State as was said by Fletcher-Moulton L.J. in *Salaman v. Secretary of State for India*,[26] is essentially an exercise of Sovereign power. In my view the act complained of here is an act of State. Secondly, on that view must be considered what consequences flow from the circumstances that the act complained of is an act of State. Assuming that the act complained of was a valid exercise of the prerogative, the result is in law that it cannot be challenged in this court."[27]

In this case the alien did not bring an action in tort against the servants of the Crown, but claimed an injunction against the Home Secretary restraining him from deporting the alien. The deportation order was an act of state in its wider meaning. But suppose that, in obedience to the deportation order, the Camp Commandant had arrested the alien and the alien had brought an action against that officer for assault. Would the defence that the arrest was an act of state have succeeded? Common sense demands an affirmative answer to that question and that is the answer that the Courts would doubtless give. But on the specific point they have not yet spoken clearly.

To sum up, it is submitted that the decision of *Johnstone v. Pedlar*[28] was deliberately cautious as to situations outside the ambit of the facts before the House, and as a result the *obiter dicta* of Scrutton and Atkin L.JJ. are too sweeping.

The position appears to be doubtful and lacks an authoritative pronouncement as to the limits of this defence to acts committed on British territory.

25. [1946] Ch. 224.
26. [1906] 1 K.B. 613.
27. [1946] 1 Ch. 224, at p. 231.
28. [1921] 2 A.C. 262.

(NOTE.—The text seems to overlook the fact that an enemy alien has no *locus standi in judicio*. There is an assumption that he can sue for damages in tort and/or for a writ of *habeas corpus*. But this surely is not so, except in the case of an implied licence to sue.
See *Soofracht (v.o.) v. Van Udens Scheepvart en Agentuur Maatschappij (N.V. Gebr.)*, [1943] A.C. 203.
The *defence* of act of state would only be resorted to against one who could sue *e.g.* a friendly alien or an enemy alien licensed to sue.—EDS.)